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ABSTRACT

This paper examines the increased activity in Vermont among proponents of educational vouchers for religious schools. It focuses on the "Chittenden" case, in which parents sued for tuition support to pay for their children's education at a local Roman Catholic high school. The report describes how the Roman Catholic Church and various political groups are calling for public monies to be used for funding religious education. Proponents of religious vouchers argue that education is a private good whose control is strictly in the hands of parents and students. Those opposed to religious vouchers ultimately rely on the First Amendment's establishment clause and, in Vermont's case, the state constitution, which prohibits the forced support of a religion. Opponents argue that the various cases that allow limited public funds, such as for special education, were for narrow purposes and the effect was not supportive of religion. The article looks at the arguments presented to the Vermont Supreme Court and the various issues presented by both sides of the religious voucher debate. It concludes that the broader issue becomes whether the state and the nation should continue to have "common schools", and it questions an educational system that is fragmented along religious, social, economic, and racial lines. (Contains 14 references.) (RJM)

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SHALL PUBLIC FUNDS BE USED TO DIRECTLY SUPPORT RELIGIOUS SCHOOLS? THE CHITTENDEN, VERMONT CASE.

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I. Introduction

The issue of separation of church and state in the funding of religious schools has again arisen. Sensing a potential shift in political and judicial currents, advocates for the use of public monies to support religious affiliated education have gone on the offensive in courts and legislatures across the nation. Having seen partial gains in special education, compensatory education and co-curricular activities, proponents are now pressing for direct financial support to religious schools through vouchers.

Much is at stake.

Opponents of religious school vouchers argue that the establishment clause of the first amendment to the United States Constitution is being violated. They harken back to a world where religious divisions and hatreds were the basis of persecution and social disorder. They claim that support of religion through government funds or activities causes is destructive of democracy. They further contend that government subsidy will ultimately result in government control and influence over religion. The resulting entanglement would be harmful to both government and religion.

Proponents consider such fears to be overblown and exaggerated. In the instant case, they argue that a failure to provide public funds to religious schools discriminates against religion. If public money can flow to public and non-sectarian private schools, then excluding religious schools is unfair. Religious based education is exactly what is needed for some children, they say, and parents should be able to select the type of education they desire. Thus, education is a private rather than a public good. Not quite so explicitly, strapped religious schools would have a new revenue source and the current expansion program could accelerate.

In addition to the Vermont case (which is now awaiting a state supreme court decision), Milwaukee's religious school voucher program is now on its way back to the Wisconsin supreme court and similar cases are underway in Ohio, Maine and Arizona. In spring, 1998, a Pennsylvania school board voted to provide religious tuition -- which will likely spark a court challenge.

II. Background

National - Until recently, the issue of general and unrestricted tuition payment has been dormant. The U. S. Supreme Court decision in Lemon v. Kurtzman fashioned a three-part summary of previous decisions and established these as "criteria developed by the Court over many years." (403 U.S. at 612). The criteria became known as the Lemon test:

(1) Does the law have a secular legislative purpose?

(2) Is its principal or primary effect one that neither advances nor inhibits religion?

(3) Does it foster an excessive entanglement with religion?

The court said that government could not "further any of the evils" which were sponsorship, financial support or active involvement in religious activity.

Proponents of public subsidies argue that tuition vouchers do not violate the Lemon test. Thus the matter came back to the U. S. Supreme Court. The 1973 Nyquist decision struck down a New York statute providing tuition reimbursements to parents who enrolled their children in primarily Roman Catholic schools.

Vermont - When general and common Vermont public education emerged in the late nineteenth and early twentieth centuries, both religious and non-religious schools were in operation around the state. As a matter of convenience, universal access to education was established through a network of quasi-sectarian academies and non-sectarian schools. This pragmatic formula pre-dated contemporary political arguments over vouchers and religious schools.

Vermont school districts are typically contiguous with town boundaries. It is sometimes not economical to operate an elementary or high school in low student population towns. Since 1869, many non-operating towns tuitioned students to public or private schools at the selection of the parents. Other towns contracted with non-sectarian public and private schools as well as sectarian schools. Under current law, tuition to a public school is allowed up to the

audited actual costs while private tuition is capped by the state average of announced public school tuition figures (16 VSA , Chapter 21).

In 1960 in the town of South Burlington, the Vermont Supreme Court ruled that the school district could not pay tuition to Rice Memorial High School which was owned and operated by the Roman Catholic Diocese of Burlington (Swart v. South Burlington). In writing for a unanimous court, Justice Holden wrote, "The price it demands poses a heavy burden on the faithful parent. He shares the expense of maintaining the public school system, yet in loyalty to his child and his belief seeks religious training elsewhere. But the same fundamental law which protects the liberty of a parent to reject the public system in the interest's of his child's spiritual welfare, enjoins the state from participating in the religious education he has selected. (122 Vt. at 188).

For 34 years, the Swart decision's prohibition against tuition payment to a religious school was the controlling force. Then, in 1994, the Vermont Supreme Court issued a ruling which confounded both supporters and opponents. In Campbell v. Manchester, the court allowed a payment to a parent who, in turn, paid tuition to an out of state religious affiliated school. The water was muddied as this same school had, at different times, been classified by the state as non-sectarian. The court approved the reimbursement as this was an indirect payment . The court said the money was paid to the parents in a neutral fashion and they, in turn, chose the school. This indirect payment logic was an extension of the the U. S. Supreme Court decision in Mueller v. Allen which allowed tax deductions in Minnesota. The last sentence of the Campbell decision stated that this decision was not a precedent for future decisions.

III. The Chittenden Case

With this backdrop of a non-precedential precedent, advocates for religious education calculated they had an opportunity to push the door wide-open. Backed by the national Council of Bishops; diocesan officials, the Mount St. Joseph's school board and a local school choice political organization used a local Roman Catholic church and religious school facilities to advance their legal and political battles for government tuition subsidies. They also initiated a "letters to the editor" campaign and lobbied legislators.

Mount St. Joseph's (MSJ) is a 200 student Roman Catholic high school in Rutland, Vermont. It is owned and operated by the church with the express

intent of providing religious oriented education. It has attracted tuition paying parents for a number of years and is a well established part of the community. Several small surrounding towns do not operate a high school, nor have a tuitioning contractual arrangement, nor are they members of a union (regional) high school. Thus, parents and students may select the high school or non-secular private school of their choice. As noted, if the private tuition exceeds the average announced tuition for public schools, the parents have to pay the difference. Based on transportation, distance, capacity of receiving schools and other factors; there are four or five effective choices -- except for those who can afford (and/or receive scholarship assistance) to MSJ and those who can arrange the excess costs and logistics for a more distant residential school.[1]

MSJ parent delegations made formal requests for tuition payment to the Chittenden and Mendon town school boards. Both of these boards are in the same supervisory union.[2] The supervisory union attorney informed the board that such an act would be in violation of the state and federal constitutions. The school board chair then asked a second attorney to draft a policy which would be more to his liking and which would allow payment to religious schools. The proposed policy said that constitutional requirements would be met and the second attorney provided an opinion that said tuition could legally be paid to religious schools. The three member Chittenden school board adopted this modified policy on December 18, 1995 and voted to pay tuition for 15 students to Mount St. Joseph's on May 6, 1996.

The three member Mendon school board, under similar circumstances, refused such payment and a suit was promptly filed against them by the same legal team which brought the Chittenden case.

The state commissioner of education served notice that state aid would be withdrawn if Chittenden persisted in what he viewed as an illegal action. On August 27, 1996, the state board agreed with the commissioner.

The Chittenden board then filed a claim for a declaration that their actions were constitutional and the commissioner filed a counter-claim. The

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[1]For a tuition system which has operated in essentially the same form for more than 30 years, it is somewhat surprising that no evaluation of the relative cost-benefits and effectiveness of this system has been conducted.

[2]Vermont towns typically have independent boards of education and are grouped into supervisory unions to provide for a superintendent of schools, special services, curriculum and instruction, business services, and the like.

state also requested an injunction against the school district distributing monies for religious tuition. The "Institute for Justice," a Washington, D.C. based advocacy group, intervened in the case in favor of religious tuition payment while a group of parents, the ACLU, and the Vermont NEA intervened to prevent secular vouchers. The issue proved fractious across the town with citizens taking legal action against the school board. The school board escrowed religious tuition money and the budget was then defeated four times.

Superior Court - Following extensive negotiations between the parties, Rutland County Superior Court granted the state's request for an injunction on October 17, 1996. The case went to trial and Judge Alden Bryan concluded that the proposed tuition payment violated the Establishment Clause of the U. S. Constitution as well as Chapter 1, Article 3 of the Vermont Constitution.

Specifically, Bryan found that the payment of tuition advanced religion in violation of the second prong of the Lemon test. In addressing the third prong, Bryan said, "The level of entanglement is just too great." The school district and the state still had to monitor the educational quality of the school due to the requirements of the recent Brigham equal opportunity decision. Additionally, the interplay of tuitions with budget votes, creeping regulation, and a history of polarization (as interest groups emerged) simply created too high a hurdle. Bryan found that the first prong of the Lemon test (Does the law have a secular purpose?) was not offended by the neutral tuitioning law (16 VSA 822).

The Vermont Constitution states, in relevant part, "No person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience." Bryan found the tuitioning scheme violated this provision.

Interestingly, Judge Bryan questioned the logic of the Vermont Supreme Court in Campbell for approving an indirect subsidy through parents. He contended that whether the payment was direct or indirect was a distinction without a difference. Instead, he said that payments, whether direct or indirect, had the effect of a direct subsidy and were unconstitutional. The injunction against payment was continued until all legal avenues were exhausted.

IV. The Supreme Court Arguments

As expected from the beginning, the issue was headed for the Vermont Supreme Court. If the Court holds that the Vermont Constitution is violated, the case will be over, for all intents and purposes. Briefs were duly filed and oral arguments were held on March 10, 1998. As two recently appointed supreme court justices were involved in the case as state government employees, two retired justices took their places. Thus, the court consisted of exactly the same justices that delivered the Campbell decision.

Arguments of the Proponents for Sectarian Tuition - The advocates argue that Campbell set precedent and that the lower court refused to honor this precedent. They read Campbell to authorize indirect payment and the only difference in Chittenden was that the payment would be direct. They further contended, "Judge Bryan completely ignores the thrust of a series of U. S. Supreme Court decisions" which allow public monies to flow to religious schools for specific reasons (Appellants, p. 7).

The central substantive argument is that in a tuitioning system, as the parents make the decision, the state and federal constitutions are not violated. The state is neutral and is, therefore, taking no action to advance religion. From there, the proponents argue the state is discriminating against parents who chose religious education since they are the only group denied tuition. In this thinking, government funded tuition monies are considered a parental entitlement to a voucher rather than a payment to an institution.

To support their case, they contended that the G. I. Bill allowed tuition to religious institutions of higher education. They also argued recent precedents requiring a publicly paid sign-language interpreter for a deaf student (Zobrest v. Catalina Foothills) and higher education funding of a religious based co-curricular publication (Rosenberger v. University of Virginia).

While vigorously disagreeing with Judge Bryan, they agree with him in that there is no difference between direct and indirect payment of tuition -- which was the key distinction in Campbell.

Arguments of the Opponents of Sectarian Tuition - The state, represented by Mark DiStefano, Assistant Attorney General, states directly that

MSJ is a religious ministry and place of worship. He cites the mandatory chapel, religious trappings, required religious courses, daily prayer, and the like. He goes on to argue that tuition payment would compel taxpayers of various faiths to support one faith whose tenants they may not embrace in violation of both state and federal constitutions

The state said that tuition payments to a pervasively sectarian school would be a direct subsidy of religious education. The availability of public funds would make MSJ more affordable and, thus, would attract more students to a religious school and relieve the financial burdens of the school. The school would be free to use the new funds for advancing their religious mission. Along the same lines, the state goes on to argue that the federal constitution is also violated as direct payment fails the first prong of the Lemon test, the "primary effect."

In terms of the U. S. Supreme Court and other court precedents cited by the proponents, the state points out that each of these circumstances was unique and very narrow -- such as for special or compensatory education. The state also points out fundamental distinctions and legal precedents between legally required elementary and secondary education, and that provided in higher education.

Finally, the state notes that all decisions of all courts which provided for general, direct and unrestricted subsidies, such as Chittenden, have been denied in the courts.

Continuing with the Lemon test, the state and the intervenors argue that excessive entanglement would be fostered. Agreeing with the lower court, they note the regulatory requirements of states for a quality education plus the establishment and entrenchment of aggressive constituencies.

V. Discussion

The Chittenden case has both legal and political significance. The *Institute for Justice*, the Roman Catholic church and various political groups are strongly advocating for public monies to be used for funding religious education. If ultimately ruled permissible by the U. S. Supreme Court, such a finding would be used in a broad-based political agenda to allow and expand such use across the nation. Enabling legislation would be proposed in state

legislatures that would likely go far beyond the boundaries of the Vermont voucher tradition.

In Vermont, as well as other states, the state constitutional requirements come into play. If found in violation of the state constitution, there is little effective recourse unless it could somehow be argued that a particular state constitution was incompatible with the United States Constitution. Thus, the question of whether the state Constitution is more or less restrictive than the U. S. Constitution, and whether the state constitution is dependent or independent, is a sub-theme in the court documents.

In this instance, the proponents of religious vouchers implicitly argue that education is a private good whose control is strictly in the hands of parents and students. Thus, curriculum content is a matter of personal rather than state interest . Beyond this reconstruction of educational purpose, if such unfettered choice is allowed, then the claim of discrimination against religion logically follows. The legal/ political approach is to broaden not only Vermont's Campbell decision but also to broaden a number of other court decisions from around the nation.

Those opposed to religious vouchers ultimately rely on the first amendment's establishment clause and, in Vermont's case, the state constitution which prohibits the forced support of a religion. They argue that the various cases which allowed limited public funds were for narrow purposes and the effect was not supportive of religion. They contend that direct, unconstrained vouchers violate the Lemon criteria in that the purpose would be secular, the primary effect would be to advance religion, and such action would lead to excessive entanglement of church and state.

Socially and educationally, the broader questions become whether the state and the nation continue to have "Common Schools" or whether, in an age of increasing fragmentation, the voucher movement and calls for privatization; schooling experiences become more segregated by religious, social, economic and racial affiliations -- a danger noted in this case as well as many other cases around the nation.

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